

DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Request for Waiver of Indebtedness]

FILE: B-199808

DATE: March 23, 1981

MATTER OF: Colonel William J. Frome, USAF (Retired)

DIGEST: A retired Regular officer was overpaid retired pay when payments were not properly reduced under the provisions of the Dual Compensation Act, 5 U.S.C. 5532, after he was advised by his agency that an exemption to the requirements of this law would not be granted. His failure to pursue the matter makes him at least partially at fault in the matter so as to preclude waiver of erroneous payments.

Colonel William J. Frome, USAF, (Retired) is appealing the action of our Claims Division which denied waiver of his debt to the United States in the amount of \$23,273.84. [The debt arose due to the failure of Air Force personnel to make deductions from his retired pay in accordance with 5 U.S.C. 5532 (1976), while he was employed as a dental surgeon in a civilian capacity with the Federal Government.] The denial of waiver must be sustained.

[Subsequent, to his retirement from the Air Force, Colonel Frome accepted a career-conditional appointment on March 18, 1975 with the National Aeronautics and Space Administration (NASA) at the Johnson Space Center. The Air Force Accounting and Finance Center requested information from NASA concerning his employment and whether he was exempt from the dual compensation provisions of 5 U.S.C. 5532. The information that he was not exempt was furnished to the Finance Center by NASA, on May 21, 1975, however, through administrative error by Air Force personnel the information was not applied to his retired pay account and the error was not discovered until April 1978. As a result his retired pay was not reduced in accordance with 5 U.S.C. 5532 from March 18, 1975, the date of his appointment until April, 1978, resulting in overpayments of \$23,273.84.)

Under 5 U.S.C. 5532 (1976) the retired pay of a Regular officer of the uniformed services must be reduced while he is employed by the Federal Government. Subsection (d) of the provision authorizes the Administrator of NASA to grant exemptions to the retired pay reduction under certain circumstances.

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Colonel Frome, in his original request for waiver, indicated that although he was unaware that he was being paid erroneously, he knew that in order to receive an exemption from the dual compensation provisions of 5 U.S.C. 5532, his employing agency must authorize the service concerned to make payment of full retired pay. He further stated that he called the Retired Pay Division of the Finance Center to notify them of his employment with NASA on August 22, 1975, and that when his exemption was verified by the official receiving his call, he considered the matter closed. In this regard, a report received from the personnel office at the Johnson Space Center states that Colonel Frome had been advised at the time of his appointment that an exception to 5 U.S.C. 5532 had not been requested.

[In his appeal, he contends that when he was informed by an official at the Finance Center that documentation definitely establishing his entitlement to the exemption existed in his records, it was no longer significant that his personnel office had not recommended the exemption. Further, he states in essence that the decisiveness of this official left no doubt in his mind as to his entitlement to the exemption.]

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if, in the opinion of the Comptroller General--

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *"

We interpret the word "fault", as used in 10 U.S.C. 2774, as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in the light of all of the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See decisions B-184514, September 10, 1975, and B-193450, February 26, 1979.

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In the present situation, Colonel Frome had no doubt from the beginning of his employment that in order for him to be exempt from a reduction in his retired pay, appropriate authorization was required from his employing agency. Since he was advised by members of the NASA personnel office that an exemption had not been requested, he should have pursued the matter thoroughly with his employer. In view of the substantial difference in retired pay involved, a telephone inquiry to an individual in the Finance Center was insufficient to establish that an exemption had been granted when, at an earlier date, he had been informed that he would not receive an exemption.

The fact that the member made some inquiries about his pay indicates initial good faith on his part. However, he must be considered at least partially at fault in accepting the erroneous payments from their inception since he failed to request more than a verbal assurance from the Finance Center that it was authorized. In view of this, we are unable to conclude that he is free from fault. Therefore, collection action is not against equity and good conscience nor is it contrary to the best interests of the United States.

Accordingly, the action of our Claims Division denying waiver is sustained.)

Milton J. Fowler

Acting Comptroller General
of the United States